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No. 90-273

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

COMMISSIONER OF REVENUE OF THE
STATE OF TENNESSEE,

v.

Petitioner,

NEWSWEEK, INC., SOUTHERN LIVING, INC., and
PROGRESSIVE FARMER, INC.,

Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Tennessee

BRIEF IN OPPOSITION OF RESPONDENTS,
SOUTHERN LIVING, INC. AND
PROGRESSIVE FARMER, INC.

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QUESTIONS PRESENTED

1. Whether the Petition For a Writ of Certiorari seeks to have this Court review decisions of the Supreme Court of Tennessee which rest upon an adequate and independent state law ground such as would deprive this Court of jurisdiction.

2. Whether Tennessee's content-based imposition of its sales tax on the sale of Respondents' "magazines," while exempting sales of "newspapers" from such tax, violates Respondents' First Amendment right to freedom of the press.

3. Whether special and important reasons exist sufficient to justify this Court exercising its discretion to grant a writ of certiorari.

THE PARTIES

Petitioner is the officer charged with the duty of enforcing the tax laws of the State of Tennessee and collecting its revenues.

Respondents, Southern Living, Inc. and Progressive Farmer, Inc., are affiliated Delaware corporations owned by Southern Progress Corporation.* The other Respondent, Newsweek, Inc., is not related to these Respondents.**

* Southern Progress Corporation, is a wholly owned subsidiary of The Time Inc. Magazine Company, a wholly owned subsidiary of Time Warner Inc. Progressive Farmer, Inc. owns no subsidiaries. All subsidiaries of Southern Progress Corporation and Southern Living, Inc. are wholly owned by them. Other subsidiaries of The Time Inc. Magazine Company not wholly owned by it are: American Family Publishers, Emerge Communications, Inc. and Fortune Italia, S.P.A. Time Warner Inc. also owns: American Television and Communications Corporation and S.S. Communications Inc. all of its other subsidiaries are wholly owned by it.

** Separate suits were filed on behalf of each of the three Respondents. Those of Southern Living, Inc. and Progressive Farmer, Inc. were consolidated for trial. The Newsweek suit was tried separately. Southern Living, Inc. and Progressive Farmer, Inc. filed a joint Notice of Appeal. Newsweek, Inc. filed a separate Notice of Appeal. The cases on appeal were briefed separately and argued separately. The Supreme Court of Tennessee rendered an opinion in both the Newsweek case and the consolidated Southern Living/Progressive Farmer case. The Commissioner of Revenue seeks review of those two separate, albeit related, judgments with a single writ of certiorari. The Respondents elect to file separate responses to this petition corresponding to the two judgments of the Tennessee Court.

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PROGRESSIVE FARMER, INC.,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Tennessee

**BRIEF IN OPPOSITION OF RESPONDENTS,
SOUTHERN LIVING, INC. AND
PROGRESSIVE FARMER, INC.**

Respondents, Southern Living, Inc., and Progressive Farmer, Inc., submit this Brief in Opposition to the Petition For a Writ of Certiorari to the Supreme Court of Tennessee filed on August 10, 1990 by the Commissioner of Revenue of the State of Tennessee.

STATEMENT OF THE CASE

Respondents are publishers of monthly periodicals, *Southern Living*, *Creative Ideas for Living*, and *Progressive Farmer*. Petitioner assessed deficiencies (taxes and interest) against Respondents (and a penalty against

Southern Living, Inc.) for uncollected sales¹ taxes on its mail order subscription sales² of its periodicals to residents of Tennessee. Respondents paid the assessments "under protest," and filed separate suits for refund.

The grounds for refund³ were essentially the same in each case:

(1) Respondents do not have sufficient contacts with Tennessee to give the State taxing jurisdiction to impose its sales tax on Respondents' mail order subscription sales of periodicals to Tennessee residents.

(2) Each of Respondents' publications is a "newspaper" exempt from tax under Tennessee Code Annotated § 67-6-329(a)(3), as defined by Tennessee Department of Revenue Regulations, Section 1320-5-1-46 ("Rule 46").⁴

¹ Petitioner calls them "use" taxes. The Stipulation says that they are "sales and/or use" taxes. (Resp. Appx. p. 6a, 13a).

² Taxes paid on "over the counter" sales are not at issue here.

³ Southern Living, Inc. seeks to recover \$1,327,845.51 (including \$185,298.71 penalty). Progressive Farmer, Inc. seeks to recover \$42,123.79. Recovery of additional taxes paid subsequent to the filing of the original suit is also pending in these and related other suits. Petitioner, complains that "these decisions, if left standing, would cause Tennessee state and local governments significant losses of critically needed revenues." Petitioner "conservatively estimates that Tennessee would derive at least \$2.7 million per year in state and local revenue from taxation of magazine subscriptions." (Petition, n.2). The argument misses the point. In the first place, the record shows that the Act of the Tennessee General Assembly which exempts "newspapers" from the sales and use tax costs the State of Tennessee \$2,665,384.64 annually just from sales of Nashville's two daily newspapers. *The Tennessean* and *The Nashville Banner*, not counting the dozens of other newspapers sold in the state. Moreover, the need to collect more revenue is no justification for violating Respondents' First Amendment rights. See pp. 9 through 12, *infra*.

⁴ Tenn. Comp. R. & Regs. tit. 17, ch. 1320-5-1-46.

(3) If each of the Respondents' publications is not an exempt "newspaper," imposition of the sales tax on sales of such publications violates Respondents' constitutional rights as follows:

(A) Respondents' Freedom of the Press rights under the First Amendment to the United States Constitution and Article I, Section 19 of the Tennessee Constitution are violated.

(B) A determination of what is a "newspaper" based on the "common and ordinary usage" of the word, criteria different from the four criteria set forth in Rule 46, is so vague as to deny Respondents due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution.

(C) The exemption denies Respondents equal protection and equal treatment under the law guaranteed to them by the Fourteenth Amendment to the United States Constitution and Article XI, Section 8 of the Tennessee Constitution.

(4) Imposition of sales tax on sales of Respondents' non-religious publications, while exempting sales of religious publications pursuant to Tennessee Code Annotated § 67-6-323, is a violation of the establishment of religion provisions of the First Amendment to the United States Constitution and of Article I, Section 3 and Article XI, Section 8 of the Tennessee Constitution.

(5) Imposition of the penalty was inequitable.

After a trial, the Chancellor dismissed Respondents' suits, holding that imposition of the tax did not violate their federal and state constitutional rights and that imposition of the penalties was not inequitable. Respond-

ents appealed the Chancellor's decisions to the Supreme Court of Tennessee and raised on appeal all of the same claims asserted in the trial court.

The Supreme Court of Tennessee reversed and unanimously held that:

We are of the opinion that the Tennessee tax scheme is invalid as it affects the plaintiffs [*Southern Living, Inc. and Progressive Farmer, Inc.*] and is in violation of their rights to freedom of speech and press under the First Amendment to the United States Constitution and Art. I, Sec. 19 of the Tennessee Constitution.

Southern Living, Inc. v. Celauro, 789 S.W.2d 251, 252 (Tenn. 1990).⁵

The Court noted that Respondents' Establishment Clause claims, as well as the other issues raised by Respondents on appeal, were "pretermitted" by the Court's Freedom of the Press ruling, but said, "We believe the issue has been settled by the United States Supreme Court opinion in *Texas Monthly, Inc. v. Bullock*, — U.S. —, 109 S.Ct. 890, — L.Ed.2d — (1989)." *Southern Living*, 789 S.W.2d at 253.

The Commissioner of Revenue's Petition for a Rehearing was denied by an Order of the Tennessee Supreme Court entered May 14, 1990. The instant Petition For a Writ of Certiorari was filed August 10, 1990. Copies of the Petition were delivered to Respondents' counsel of record August 13, 1990.

⁵ The Supreme Court of Tennessee held similarly in *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247, 250 (Tenn. 1990), issued on the same day.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition For a Writ of Certiorari should be denied for the following reasons:

I. THIS COURT LACKS JURISDICTION TO DECIDE THESE CASES BECAUSE THE DECISIONS PETITIONER SEEKS TO HAVE REVIEWED REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND

The Supreme Court of Tennessee held:

We are of the opinion that the Tennessee tax scheme is invalid as it affects the plaintiffs and is in violation of their rights to freedom of speech and press under the First Amendment to the United States Constitution *and* Art. I, Sec. 19 of the Tennessee Constitution.

Southern Living, 789 S.W.2d at 252 (emphasis added).⁶

This Court traditionally has refrained from reviewing cases in which a state court decision is based upon both a federal ground and an adequate and independent state ground. This restraint has been stated in terms of a limitation on the Court's jurisdiction. *Herb v. Pitcairn*, 324 U.S. 117 (1945) holds:

This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [Citations omitted]. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems *and in the limitations on our own jurisdiction*. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong

⁶ Art. I, Section 19 of the Tennessee Constitution guarantees "freedom of speech and press." (See Resp. Appx. p. 1a).

judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion.

Id. at 126 (emphasis added).

In order to determine whether “an adequate and independent state ground” exists, this Court requires a “plain statement” by the state court that its decision rests upon an adequate and independent state ground. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

The quoted holding of the Supreme Court of Tennessee is a “plain statement” that there is an adequate and independent state ground for the decisions in these cases, parallel to the one found in the First Amendment. The Supreme Court of Tennessee held that the protection of speech and press found in the Tennessee Constitution had a scope “at least as broad as that afforded those freedoms by the First Amendment to the United States Constitution.” *Southern Living*, 789 S.W.2d at 253.

Therefore, this Court should deny the Petition For a Wrti of Certiorari.

II. TENNESSEE'S CONTENT-BASED TAXING SCHEME VIOLATES RESPONDENTS' FIRST AMENDMENT FREEDOMS AND THE JUDGMENT OF THE SUPREME COURT OF TENNESSEE WAS CORRECTLY DECIDED

The “Question Presented” by Petitioner misstates the decision of the Supreme Court of Tennessee, which correctly held under the facts presented in the record that the challenged taxing scheme was not “content-neutral”, and properly applied “strict scrutiny” to the State’s asserted justifications.

A. The taxing scheme challenged by Respondents is not "content-neutral"

Petitioner stated the "Question Presented" as follows:

Whether the Equal Protection Clause and the First Amendment require that state tax and exemption statutes providing content-neutral distinctions between different segments of the communications media, such as between newspapers and magazines, must satisfy strict scrutiny.

(Petition, page i).

The Supreme Court of Tennessee rejected Petitioner's argument, advanced for the first-time on appeal, that the newspaper exemption can be justified as "content-neutral". The Court concluded that:

This analysis does not pass muster in light of the requirement that in order to qualify for the newspaper exemption in Tennessee, among other things, a publication must contain matters of general interest and reports of current events. Rule 46 (2) (d). *This is not a content-neutral requirement.*

Newsweek, 789 S.W.2d at 249. (Emphasis added).

The "Question Presented" by petitioner incorrectly characterizes as "content-neutral" the taxing distinctions made by Tennessee's authorities among elements of the print media. Rule 46, establishes four criteria by which Petitioner defines a "newspaper" for purposes of applying the exemption statute:

(2) In order to constitute a newspaper the publication must contain at least the following elements:

(a) It must be published at stated short intervals (usually daily or weekly).

(b) It must not, when its successive issues are put together, constitute a book.

(c) It must be intended for circulation among the general public.

(d) *It must contain matters of general interest or reports of current events.*

Tenn. Comp. R. & Regs. tit. 17, ch. 1320-S-1-46 (1983).
(Emphasis added)

The State's only witness, Mr. Bracey, the Director of the Sales and Use Tax division, when questioned on cross-examination how he would determine whether or not a publication was an exempt "newspaper," testified, "I guess I'm saying what I would like to do is take each case on its own merits and look at the contents of the paper."⁷

Plainly stated, application of Rule 46 requires at a minimum, that in order to determine whether a publication is a "newspaper" for purposes of the tax exemption,

⁷ Transcript Trial Proceedings, p. 62 (Resp. Appx. p. 23a) (emphasis added). A reading of that portion of Mr. Bracey's trial testimony in Respondents' Appendix at pages 18a-23a, demonstrates that in extending or withholding the statutory exemption available to "newspapers", the Department, whether applying the published criteria of Rule 46 or applying other unpublished criteria, makes an analysis of the *content* of the publication without regard to its form. On direct examination Mr. Bracey stated, "In other words, a newspaper *contains* news, instead of just being for entertainment or enjoyment." (Bracey, Trial Transcript, p. 24, Resp. Appx. p. 19a) (emphasis added). Again, on direct examination he stated (with respect to his perusal of *Southern Living*), "I might indicate, too, whether it *contains* matters of general interest and reports of current events. I would say it does not." (Bracey, Trial Transcript, p. 26, Resp. Appx. p. 21a) (emphasis added). Petitioner would have this Court ignore the facts testified to by the State's own official representative as to how the statutory "newspaper" exemption is actually applied by Department of Revenue officials with reference to the contents of the publication. Petitioner asks this Court to presume, without any factual predicate whatever, that the State makes a "content-neutral" determination as to which publications are exempt "newspapers" and which are taxable "magazines". The State's assertion that this is a "content-neutral" taxing scheme blatantly disregards the testimony of its own witness, and is contrary to the finding of the Supreme Court of Tennessee that this is not a content-neutral taxing scheme.

a bureaucrat in the Tennessee Department of Revenue must examine its contents to see if it contains "matters of general interest and reports of current events." The Tennessee Supreme Court properly held that this content-based discrimination violates the First Amendment, citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-30 (1987).⁸

B. The Supreme Court of Tennessee properly applied strict scrutiny to Tennessee's content-based taxing scheme

The legal issue decided by the Supreme Court of Tennessee involved Federal and State constitutional provisions regarding freedom of the press.⁹ In making its analysis the Supreme Court of Tennessee properly applied "strict scrutiny" under the relevant decisions previously enunciated by this Court. In *Minneapolis Star and Tribune Co. v. Minnesota Comm'r. of Revenue*, 460 U.S.

⁸ The holding relied upon by the Supreme Court of Tennessee reads as follows:

Indeed, this case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*. [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . [citations omitted.]

Arkansas Writers', 481 U.S. 221, 229-30.

⁹ "We look initially to the constitutional claims charging violation of plaintiff's first amendment guarantees of freedom of the press and freedom of expression. *These claims are dispositive if found against the State.*" *Newsweek*, 789 S.W.2d at 248 (emphasis added). "We hold therefore the tax is invalid under the First Amendment." *Id.* at 250. "We are of the opinion that the Tennessee tax scheme is in violation of their rights to freedom of speech and press under the First Amendment to the United States Constitution and Art. I, Sec. 19 of the Tennessee Constitution." *Southern Living*, 789 S.W.2d at 252.

575 (1983), this Court held that the First Amendment precludes a state from imposing a tax only on the press and that the tax also violated the plaintiff's First Amendment rights because it targeted a small group of newspapers.

The Tennessee tax scheme targets for taxation certain individual publications within the press—"non-newspapers"—and exempts others—"newspapers". The justification posed for the first time by the State on appeal—that of promoting dissemination of "news and information" on an "immediate" basis (an immediacy presumably, but without a factual predicate, unavailable to magazines)—was correctly rejected by the Supreme Court of Tennessee.¹⁰

The Tennessee Supreme Court's reliance on *Arkansas Writers'* is not misplaced. In *Arkansas Writers'*, this Court declared the Arkansas sales and use tax scheme which exempted all newspapers and certain magazines, but imposed the tax on plaintiff's general interest monthly publication, *Arkansas Times*, to be invalid and a violation of the plaintiff's First Amendment right to freedom of the press.

The thrust of Petitioner's argument seems to be that the Supreme Court of Tennessee improperly analyzed

¹⁰ Petitioner prevailed in the Chancery Court on his justification advanced at trial that the taxing scheme "reduced regulations" and "furthered freedom of the press" and was therefore a sufficiently compelling state interest to warrant exempting newspapers. On appeal Petitioner abandoned this indefensible and insufficiently compelling justification and asserted a new one—that the State could rationally encourage the swift and immediate dissemination of "news and information" to the public by exempting "newspapers". Any argument that this justification constitutes a "compelling state interest" has been laid to rest in *Arkansas Writers'*, where this Court held that "[w]hile this state interest [to foster communications] might support a blanket exemption of the press from the sales tax, it cannot justify selective taxation of certain publishers." *Arkansas Writers'* at 232. It was rejected as well by the Supreme Court of Tennessee.

these cases in terms of the State's violation of the First Amendment and incorrectly applied the "strict scrutiny" test set forth in both *Minneapolis Star* and *Arkansas Writers'*. Petitioner seeks to have this Court "analyze this case solely as a problem of equal protection, applying the familiar tiers of scrutiny."¹¹ Petitioner relies on *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), and asserts that in *Taxation With Representation* "this Court recognized that distinctions in tax statutes are to be evaluated according to the 'rational basis' standard of equal protection analysis, even in cases involving First Amendment interests, unless the statutes suppress expression or employ suspect classifications such as race or national origin." (Petition p. 11).

Petitioner argue incorrectly that *Taxation With Representation* establishes a "reasonable basis" test in First Amendment cases involving a state's discriminatory tax treatment of different types of print media. While *Taxation With Representation* involved a content-neutral¹² federal taxing scheme with First Amendment implications, it is inapplicable to these cases, which involve content based tax discrimination by the State between different members of the print media.

¹¹ The majority opinion in applying a "strict scrutiny" analysis in *Minneapolis Star*, 460 U.S. 575, 585 points out in footnote 7 that "equal protection" was the analysis and level of scrutiny advanced in the dissenting opinion in that case. -

¹² Justice Blackmun (with whom Justices Brennan and Marshall joined) concurred in the majority opinion and wrote:

Because 26 U.S.C. § 501's discrimination between veteran's organizations and charitable organizations is *not based on the content* of their speech, *ante*, at 548, I agree with the Court that § 501 does not deny charitable organizations equal protection of the law.

Taxation With Representation, 461 U.S. 540, 551. (Emphasis added).

In summary, the question presented in the Petition does not accurately state the judgment which Petitioner seeks to have reviewed. Rather than "content-neutral" as alleged in the Petition, Tennessee's taxing scheme is clearly content-based. The Supreme Court of Tennessee properly applied strict scrutiny to the challenged statute. Therefore, there are no special and important reasons why this Court should exercise its judicial discretion to review the decision of the Supreme Court of Tennessee in this case. The Petition For a Writ of Certiorari is not well taken and should be denied.

III. THERE IS NO REASON FOR THIS COURT TO EXERCISE ITS DISCRETION AND GRANT A WRIT OF CERTIORARI

None of the criteria of Rule 10.1 of the Rules of the Supreme Court of the United States which guide this Court in the exercise of its discretion to grant or deny petitions for a writ of cetrriorari are present in this case. No decision by a United States Court of Appeals is involved. The federal constitutional issued decided by the Tennessee Supreme Court has been decided by this Court and the Tennessee Court's decision was in accordance with those controlling precedents. Finally, the decisions of the various state courts of last resort which have ruled on the First Amendment issue presented here are in accord with the decision of the Supreme Court of Tennessee. *Louisiana Life, Ltd. v. McNamara*, 504 So. 2d 900 (La. App. 1987); *McGraw-Hill, Inc. v. State Tax Comm'n.*, 146 A.D.2d 371, 541 N.Y.S.2d 252 (N.Y. App. Div. 1989), *aff'd* 552 N.E.2d 163, 552 N.Y.S.2d 915 (N.Y. 1990); *The Hearst Corp. v. Director of Revenue*, 779 S.W.2d 559 (Mo. 1989); *Dow Jones & Co., Inc. v. Oklahoma Tax Comm'n.*, 787 P.2d 843 (Okla. 1990); *Dept. of Revenue v. Magazine Publishers of America, Inc.*, No. 75,201 (Fla. May 31, 1990) (LEXIS, States Library, Fla. file); *Medlock v. Pledger*, 785 S.W.2d 202 (Ark. 1990).

The decision of the Supreme Court of Tennessee pre-terminated other federal and state constitutional issues presented to it on appeal, each of which issues would sustain a judgment in Respondents' favor. Those pre-terminated issues are not before this Court.

Respondents say their publications are "newspapers" as defined in Rule 46. Petitioner says that Respondents' publications do not precisely fit Rule 46, but that nevertheless Rule 46 is not determinative of the issue, and that none of Respondents' publications fits "the common and popularly accepted" definition of a newspaper. If these stated criteria are not determinative of the question, then Rule 46 is an illusion and Petitioner is acting in an arbitrary and capricious manner by imposing a standard that is so vague as to be meaningless to taxpayers called upon to interpret it at their peril. This is a violation of Respondents' rights to due process and equal protection of the law.¹³ These issues were not decided by the Supreme Court of Tennessee.

Respondents also assert at trial and on appeal that they lack sufficient nexus with Tennessee to be liable for Tennessee taxes on their respective mail order sales. *National Bellas Hess v. Illinois Dept. of Revenue*, 386 U.S. 753 (1967). This issue was not decided by the Supreme Court of Tennessee.

Finally, Respondents raised at trial and on appeal the issue of whether a tax on their non-religious publications while exempting certain religious publications under Tenn. Code Ann. § 67-6-323 is an unconstitutional establishment of religion. The Supreme Court of Tennessee correctly observed that this issue would be controlled in

¹³ If *Newsweek*, which was stipulated to fit precisely all four criteria of Rule 46, were held to be an exempt "newspaper", but *Southern Living*, *Creative Ideas for Living*, and *Progressive Farmer* were held to be non-exempt "magazines", such content-based discrimination as among "newsmagazines" and other "magazines" would be prohibited by *Arkansas Writers'*.

Respondents' favor by this Court's holding in *Texas Monthly, Inc. v. Bullock*. By omitting any discussion of *Texas Monthly*, Petitioner apparently does not disagree with the Tennessee Court's view on this issue.

Thus, even if the issue presented in the Commissioner's Petition were resolved by this Court in his favor, such a ruling would not affect the outcome of this lawsuit, and, for this reason too, this case does not present an appropriate occasion for review on certiorari.

CONCLUSION

For the reasons set forth herein the Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX

TENNESSEE CONSTITUTION

ARTICLE I

Sec. 3. Freedom of worship.—That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

Sec. 8. General laws only to be passed.—The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring-himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfere with or divest rights which have become vested.

Sec. 19. Freedom of speech and press.—That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of

man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases.

TENNESSEE CONSTITUTION

ARTICLE XI

Sec. 8. No man to be disturbed but by law.—That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

TENNESSEE CODE ANNOTATED

§ 67-6-323. Religious publications.—The taxes levied under this chapter shall not apply to the use, sale, or distribution of religious publications to or by churches or other religious or charitable institutions for use in the customary religious or charitable activities. [Acts 1947, ch. 3, § 4; C. Supp. 1950, § 1248.59 (Williams § 1328.25); T.C.A. (orig. ed.), § 67-3010.]

SALES AND USE TAXES

§ 67-6-329. Miscellaneous exemptions.—(a) The sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state of the following tangible personal property is specifically exempted from the tax imposed by this chapter:

- (1) . . .
- (2) . . .
- (3) Newspapers . . .

Tenn. Comp. R. & Regs. Tit. 17, Ch. 13-20-5-1-.46

**1320-5-1-.46 PUBLISHERS OF NEWSPAPERS,
MAGAZINES, PERIODICALS.**

- (1) Sales of newspapers, whether by publishers or others, are specifically exempt from the Sales or Use Tax. Sales of paper and ink used for manufacturing newspapers are sales for further processing and are also exempt from tax.
- (2) In order to constitute a newspaper, the publication must contain at least the following elements:
 - (a) It must be published at stated short intervals (usually daily or weekly).
 - (b) It must not, when its successive issues are put together, constitute a book.
 - (c) It must be intended for circulation among the general public.
 - (d) It must contain matters of general interest and reports of current events.
- (3) Notwithstanding the fact that the publication may be devoted primarily to matters of specialized interest, such as legal, mercantile, political, religious or sporting matters, if, in addition to the special interest it serves, the alleged newspaper contains general news of the day, information of current events, and news of importance and of current interest to the general public, it is entitled to be classed as a newspaper.
- (4) Sales of magazines, periodicals, and all publications other than newspapers, whether made "over the counter," or by subscription, are subject to the Sales or Use Tax.

- (5) Where subscriptions are placed or accepted for magazines or any other publication published in in a series or serial manner, which are subject to the Sales or Use Tax, the Sales or Use Tax shall accrue and be assessed at the time of the acceptance of the subscription.
- (6) Publishers of books, loose leaf reports, etc., concerning banking, business, insurance, tax and other similar types of information, law, cases, etc., and concerning events such as contractor activities, social and sports events, credit etc., where there is a general distribution of the same book, report, or other publication, shall be deemed to be dealers, and such books, and other publications shall be subject to the Sales and Use Tax. Where a special report is made, and no general distribution is made of the report, no Sales or Use Tax is due.
- (7) The sale or use of shoppers advertisers using newsprint distributed in this state or within a twenty-five (25) mile radius thereof at regular intervals and provided without charge to the shopper is exempt from tax.

IN THE CHANCERY COURT
OF DAVIDSON COUNTY, TENNESSEE

No. 86-933-I

SOUTHERN LIVING, INC.,
Plaintiff,

vs.

KATHRYN BEAHM CELAURO, COMMISSIONER OF
REVENUE, STATE OF TENNESSEE,
Defendant.

STIPULATION

[Filed Sept. 9, 1988]

It is stipulated by the parties that the following matters may be considered by the Court as agreed facts in this case and that such facts existed at all times relevant to the matters at issue herein.

1. The plaintiff, Southern Living, Inc., is a business corporation duly organized and existing under the laws of the State of Delaware with its principal place of business in Birmingham, Alabama. The defendant, Kathryn Beahm Celauro, at the time suit was brought, was the duly appointed and serving Commissioner of Revenue of the State of Tennessee. She has been succeeded in office by Dudley W. Taylor, who is now the duly appointed and serving Commissioner of Revenue of the State of Tennessee. It is agreed that the plaintiff may proceed against the defendant, the State of Tennessee, without a formal change of name.

2. On October 8, 1985, plaintiff paid to defendant, involuntarily in view of threatened levy and under protest, \$1,259,676.88 in full payment of tax, interest and penalties assessed against the plaintiff. Subsequent to October

8, 1985, and prior to filing suit, plaintiff paid to defendant, involuntarily in view of threatened levy and under protest, the additional sum of \$91,953.91 alleged to be the State's sales and/or use tax. Subsequent to the date of filing suit herein, plaintiff has made further payments of sales and/or use tax to the defendant on subscription sales of its magazines to residents of Tennessee for the period May, 1986 through September, 1987, in the total sum of \$163,568.70, for which sums defendant has waived the requirement of filing claim for refund pursuant to T.C.A. § 67-1802(c) (2). A copy of the audit report, notice of assessment and letter of waiver are attached hereto as collective Exhibit "A".

3. The tax deficiencies assessed against plaintiff by defendant and for which plaintiff has made payment to defendant as set forth in paragraph 2 and sued for herein were for sales taxes alleged to be due on the sale by plaintiff of its Periodicals to residents of Tennessee by subscription, pursuant to the taxation of general sales at retail statute, T.C.A. § 67-6-202.

4. Plaintiff is a publisher primarily engaged in the business of selling *Southern Living* and *Creative Ideas For Living* ("plaintiff's Periodicals"), news periodicals produced and distributed on a monthly basis for circulation among the general public, which contain matters of general interest and reports of current events relating to the Southern region of the United States. Plaintiff's Periodicals, when their successive issues are put together, do constitute a book.

5. Plaintiff sells copies of its Periodicals that ultimately come to rest in Tennessee in two ways. First, plaintiff sells to customers within Tennessee by direct subscription obtained by mail order or by solicitations by third parties to customers within Tennessee. Requests for direct subscriptions are mailed by the customer to plaintiff's offices in Birmingham, Alabama, on order forms contained in announcements mailed from outside Tennes-

see or order forms contained in individual issues of Plaintiff's Periodicals. Requests for direct subscriptions are then accepted by plaintiff in Birmingham, Alabama, where all subscription records are kept and all matters relating to subscriptions are directed. Subscriptions to plaintiff's Periodicals are also sold to residents of Tennessee by representatives of QSP, Inc. calling on customers in Tennessee. Formerly this was by contract with Sunland Plans, Inc. which was acquired by QSP, Inc. QSP, Inc. has no direct or indirect ownership with plaintiff. (A copy of the agreement between Sunland Plans, Inc. and Southern Living is attached hereto as collective Exhibit "B".) Sunland Plans, Inc. and QSP, Inc. are marketing companies that simultaneously market magazine subscriptions to numerous periodicals including *Southern Living*, by contract with schools and other like organizations. When subscriptions to *Southern Living* are obtained by a representative of an organization acting under contract with Sunland Plans, Inc. or QSP, Inc., the subscription forms and a check for the "remit" or net amount due to *Southern Living* is mailed by the marketing company to Southern Living, Inc. and the marketing company retains its agreed upon portion of the subscription price. The marketing company pays the school or other organization the amount due it by agreement, separately negotiated over which Southern Living, Inc. has no knowledge or control. Other than as set forth in the agreement, Southern Living does not have or exercise any direction or control over the marketing company, the organizations it contracts with, or the students who actually solicit subscriptions, nor over the time, manner or means by which such solicitations are made. The subscriptions solicited by representatives of organizations acting under contract with Sunland Plans, Inc. or QSP, Inc. are subject to approval and acceptance by Southern Living, Inc. No further stipulation is intended to be

made concerning the relationship between plaintiff and sales representatives of QSP, Inc. Subscriptions to *Southern Living* are also obtained occasionally by a direct mail marketer such as Ebsco. Although *Southern Living* does not authorize its publication to be promoted by direct mail marketers, it will accept random subscriptions that occasionally come in that way. Another way in which plaintiff's Periodicals are sold is at wholesale for resale to newstand operators and other vendors. Defendant does not assert that plaintiff owes any tax on sales at retail by newsstand vendors, and accordingly sales by this method are not presently in dispute.

6. Pursuant to contract with plaintiff, Baird-Ward Printing Company, Inc. ("Baird-Ward"), which has no direct or indirect common ownership with plaintiff, receives in Tennessee, paper, subscription labels, and film sent by the plaintiff from Birmingham Alabama (a copy of the contract with Baird-Ward is attached hereto as Exhibit "C"). Pursuant to its contract with plaintiff, Baird-Ward produces plaintiff's Periodicals in the Baird-Ward plant in Nashville, Tennessee, for transmission by U.S. Mail to subscribers within and without Tennessee. Editorial material is produced in manuscript form by *Southern Living* at its offices in Birmingham, Alabama, reduced to film and the film is mailed to Nashville, Tennessee, where Baird-Ward uses it to make printing plates. The plates are used by Baird-Ward to print *Southern Living* on paper supplied by *Southern Living* and stored by Baird-Ward on its premises in sufficient quantity to print two issues of *Southern Living*. After printing the copies of *Southern Living* to be mailed to subscribers and affixed to them mailing labels prepared and provided to Baird-Ward by *Southern Living*'s fulfillment office in Birmingham, Alabama. Copies with labels affixed were delivered by Baird-Ward to U.S. mail facilities for mailing to subscribers.

7. Plaintiff does not maintain an office in Tennessee. Plaintiff maintains no sales force in Tennessee and no salesmen employed by plaintiff come into Tennessee for the purpose of seeking subscriptions. Plaintiff employs an advertising salesman who is based in Atlanta, Georgia, and who comes into Tennessee to solicit advertising for *Southern Living* 10 to 12 times each year.

8. Pursuant to T.C.A. § 67-6-329(3), the defendant exempts from imposition of the sales and use tax "newspapers" as described in Tennessee Department of Revenue Regulation § 1320-5-1.46(2). A number of daily and weekly newspapers enjoy this exemption including weekly publications which are sold and delivered as part of the "newspapers." On July 19, 1987, a copy of the *New York Times* Sunday newspaper was purchased at retail from Bookworld, Inc. in Nashville, Tennessee. Included within the *New York Times* newspaper was the *New York Times Magazine* (a copy of which is attached hereto with sales receipt as collective Exhibit "D"). The seller did not charge and the buyer did not pay a state or local sales tax on this purchase. In addition, various publications such as *Parade* (a copy of which is attached hereto as Exhibit "E") and *USA Weekend* (a copy of which is attached hereto as Exhibit "F"), are sold and distributed in Tennessee as part of or supplements to the Sunday editions of newspapers such as *The Tennessean* and the *Chattanooga Times-Free Press*. At the time of purchase and at all times prior thereto which are relevant to this suit, it was the position of the Tennessee Department of Revenue not to impose a tax on such sales, and it has continued to be and is currently the position of the Tennessee Department of Revenue not to impose a tax on such sales. On the same date and place copies of *Newsweek* and *Southern Living* were purchased (a copy of which is attached with sales receipt as collective Exhibit "G"). The seller charged and the buyer paid a state and local sales tax on these purchases. It was then, is now,

and at all times relevant hereto, the position of the Tennessee Department of Revenue that the state and local sales tax was due on the sale of these publications.

9. Attached hereto as collective Exhibit "H" are examples of advertising supplements and other printed matter distributed in Tennessee with newspaper with respect to which it was at all times relevant to this suit and is now the position of the Tennessee Department of Revenue that no state or local sales tax was due on the sale of these publications as part of a "newspaper." Attached hereto as collective Exhibit "I" are examples of "shoppers advertisers" with respect to which it was at all times relevant to this suit and is now the position of the Tennessee Department of Revenue that no state or local sales or use tax was due if provided without charge.

10. Pursuant to T.C.A. § 67-6-323, the defendant treats as exempt and does not impose a tax on the sale to, use by, or distribution by any church or other religious or charitable institutions of religious publications for use in the customary religious or charitable activities.

11. Pursuant to T.C.A. § 67-6-329(a) (4) (12) and (14), the defendant treats as exempt and does not impose a tax on the sale or use of:

- (a) advertising supplements or other printed matter printed in Tennessee and distributed with newspapers (effective 5/17/87);

- (b) shopper's advertisers using newsprint distributed in Tennessee or within a twenty-five (25) mile radius thereof at regular intervals and provided without charge to the shopper, or

- (c) school books.

12. It is agreed that collective Exhibit "B" and "C" hereto will be kept confidential by the defendant and will be introduced into Court as part of this Stipulation pursuant to an Agreed Protective Order to be issued by the

Court, sealed and maintained as confidential court records.

November 9, 1987

/s/ Charles A. Trost
Attorney for Plaintiff

/s/ H. Rowan Leathers, III
Attorney for Plaintiff

IN THE CHANCERY COURT
OF DAVIDSON COUNTY, TENNESSEE

No. 86-934-II (I)

PROGRESSIVE FARMER, INC.,
Plaintiff,

vs.

KATHRYN BEAHM CELAURO, COMMISSIONER OF
REVENUE, STATE OF TENNESSEE,
Defendant.

STIPULATION

It is stipulated by the parties that the following matters may be considered by the Court as agreed facts in this case and that such facts existed at all times relevant to the matters at issue herein.

1. The plaintiff, Progressive Farmer, Inc. is a business corporation duly organized and existing under the laws of the State of Delaware with its principal place of business in Birmingham, Alabama. The defendant, Kathryn Beahm Celauro, at the time suit was brought, was the duly appointed and serving Commissioner of Revenue of the State of Tennessee. She has been succeeded in office by Dudley W. Taylor, who is now the duly appointed and serving Commissioner of Revenue of the State of Tennessee. It is agreed that the plaintiff may proceed against the defendant, the State of Tennessee, without a formal change of name.

2. On October 8, 1985, plaintiff paid to defendant, involuntarily in view of threatened levy and under protest, \$30,555.67 in full payment of tax, interest and penalties assessed against the plaintiff. Subsequent to October 8,

1985, and prior to filing suit, plaintiff paid to defendant, involuntarily in view of threatened levy and under protest, the additional sum of \$11,566.52 alleged to be the State's sales and/or use tax. Subsequent to the date of filing suit herein, plaintiff has made further payments of sales and/or use tax to the defendant on subscription sales of its magazine to residents of Tennessee for the period May, 1986 through September, 1987, in the total sum of \$22,878.95, for which sums defendant has waived the requirement of filing claim for refund pursuant to T.C.A. § 67-1802(c)(2). A copy of the audit report, notice of assessment and letter of waiver are attached hereto as Exhibit "A".

3. The tax deficiencies assessed against plaintiff by defendant and for which plaintiff has made payment to defendant as set forth in paragraph 2 and sued for herein were for sales taxes alleged to be due on the sale by plaintiff of its periodical, *Progressive Farmer*, to residents of Tennessee by subscription, pursuant to the taxation of general sales at retail statute, T.C.A. § 67-6-202.

4. Plaintiff is a publisher primarily engaged in the business of selling *Progressive Farmer*, a news periodical produced and distributed on a monthly basis for circulation among the general public, which contains matters of general interest and reports of current events relating to farming, agriculture and rural life in the United States. *Progressive Farmer*, when its successive issues are put together, does not constitute a book.

5. Plaintiff sells copies of *Progressive Farmer* that ultimately come to rest in Tennessee by direct subscription obtained by mail order. Requests for direct subscriptions are mailed by the customer to plaintiff's offices in Birmingham, Alabama, on order forms contained in announcements mailed from outside Tennessee or order forms contained in individual issues of *Progressive Farmer* magazine. Requests for direct subscriptions are then accepted by plaintiff in Birmingham, Alabama,

where all subscription records are kept and all matters relating to subscriptions are directed. Subscriptions to *Progressive Farmer* are also sold to residents of Tennessee by representatives of QSP, Inc. calling on customers in Tennessee. Formerly this was by contract with Sunland Plans, Inc. which was acquired by QSP, Inc. QSP, Inc. has no direct or indirect ownership with plaintiff. (A copy of the agreement between Sunland Plans, Inc. and plaintiff is attached hereto as collective Exhibit "B"). Sunland Plans, Inc. and QSP, Inc. are marketing companies that simultaneously market magazine subscriptions to numerous periodicals, including *Progressive Farmer*, by contract with schools and other like organizations. When subscriptions to *Progressive Farmer* are obtained by a representative of an organization acting under contract with Sunland Plans, Inc. or QSP, Inc., the subscription forms and a check for the "remit" or net amount due to *Progressive Farmer, Inc.* is mailed by the marketing company to *Progressive Farmer, Inc.* and the marketing company retains its agreed upon portion of the subscription price. The marketing company pays the school or other organization the amount due it by agreement, separately negotiated over which *Progressive Farmer, Inc.* has no knowledge or control. Other than as set forth in the agreement, plaintiff does not have or exercise any direction or control over the marketing company, the organizations it contracts with, or the students who actually solicit subscriptions, nor over the time, manner or means by which such solicitations are made. The subscriptions solicited by representatives of organizations acting unde contract with Sunland Plans, Inc. or QSP, Inc. are subject to approval and acceptance by *Progressive Farmer, Inc.* No further stipulation is intended to be made concerning the relationship between plaintiff and sales representatives of QSP, Inc. Subscriptions to *Progressive Farmer* are also obtained occasionally by a direct mail marketer such as Ebsco. Although *Progressive Farmer* does not authorize its publication to be pro-

moted by direct mail marketers, it will accept random subscriptions that occasionally come in that way. Defendant does not assert that plaintiff owes any tax on sales at retail by newsstand vendors, and accordingly sales by this method are not presently in dispute.

6. Pursuant to contract with plaintiff, Baird-Ward Printing Company, Inc. ("Baird-Ward"), which has no direct or indirect common ownership with plaintiff, receives in Tennessee, paper, subscription labels, and film sent by the plaintiff from Birmingham, Alabama (a copy of the contract with Baird-Ward is attached hereto as Exhibit "C"). Pursuant to its contract with plaintiff, Baird-Ward produces *Progressive Farmer* magazine in the Baird-Ward plant in Nashville, Tennessee, for transmission by U.S. mail to subscribers within and without Tennessee. Editorial materials are produced in manuscript form by plaintiff at its offices in Birmingham, Alabama, reduced to film and the film is mailed to Nashville, Tennessee, where Baird-Ward uses it to make printing plates. The plates are used by Baird-Ward to print *Progressive Farmer* on paper supplied by plaintiff and stored by Baird-Ward on its premises in sufficient quantity to print two issues of *Progressive Farmer*. After printing the copies of *Progressive Farmer* to be mailed to subscribers had affixed to them mailing labels prepared and provided to Baird-Ward by plaintiffs fulfillment office in Birmingham, Alabama. Copies with labels affixed were delivered by Baird-Ward to U.S. mail facilities for mailing to subscribers.

7. Plaintiff maintains editorial offices in Davidson and Shelby counties in Tennessee with two employees, an editor and a secretary, at each office. Plaintiff maintains no sales force in Tennessee and no salesmen employed by plaintiff come into Tennessee for the purpose of seeking subscriptions. Advertising employees of plaintiff based in Atlanta, Georgia, come into Tennessee from time to time to solicit advertising for plaintiff.

8. Pursuant to T.C.A. § 67-6-329(3), the defendant exempts from imposition of the sales and use tax "news-papers" as described in Tennessee Department of Revenue Regulation § 1320-5-1.46(2). A number of daily and weekly newspapers enjoy this exemption including newspapers including weekly publications which are sold and delivered as part of the "newspapers." On July 19, 1987, a copy of the *New York Times* Sunday newspaper was purchased at retail from Bookworld, Inc. in Nashville, Tennessee. Included within the *New York Times* newspaper was the *New York Times Magazine* (a copy of which is attached with sales receipt as collective Exhibit "D"). The seller did not charge and the buyer did not pay a state or local sales tax on this purchase. In addition, various publications such as *Parade* (a copy of which is attached hereto as Exhibit "E") and *USA Weekend* (a copy of which is attached hereto as Exhibit "F"), are sold and distributed in Tennessee as part of or supplements to the Sunday editions of newspapers such as *The Tennessean* and the *Chattanooga Times-Free Press*. At the time of purchase and at all times prior thereto which are relevant to this suit, it was the position of the Tennessee Department of Revenue not to impose a tax on such sales, and it has continued to be and is currently the position of the Tennessee Department of Revenue not to impose a tax on such sales. On the same date and place copies of *Newsweek* and *Southern Living* were purchased (a copy of which is attached hereto with sales receipt as collective Exhibit "G"). The seller charged and the buyer paid a state and local sales tax on these purchases. It was then, is now, and at all times relevant hereto, the position of the Tennessee Department of Revenue that the state and local sales tax was due on the sale of these publications.

9. Attached hereto as collective Exhibit "H" are examples of advertising supplements and other printed matter distributed in Tennessee with newspapers with respect to which it was at all times relevant to this suit

and is now the position of the Tennessee Department of Revenue that no state or local sales tax was due on the sale of these publications as a part of a "newspaper." Attached hereto as Exhibit "I" are examples of "shoppers advertisers" with respect to which it was at all times relevant to this suit and is now the position of the Tennessee Department of Revenue that no state or local sales or use tax was due if provided without charge.

10. Pursuant to T.C.A. § 67-6-323, the defendant treats as exempt and does not impose a tax on the sale to, use by, or distribution by any church or other religious or charitable institutions of religious publications for use in the customary religious or charitable activities.

11. Pursuant to T.C.A. § 67-6-329(a)(4)(12) and (14), the defendant treats as exempt and does not impose a tax on the sale or use of:

(a) advertising supplements or other printed matter printed in Tennessee and distributed with newspapers (effective 5/17/87);

(b) shopper's advertisers using newsprint distributed in Tennessee or within a twenty-five (25) mile radius thereof at regular intervals and provided without charge to the shopper, or

(c) school books.

12. It is agreed that collective Exhibits "B" and "C" hereto will be kept confidential by the defendant and will be introduced into Court as part of this Stipulation pursuant to an Agreed Protective Order to be issued by the Court, sealed and maintained as confidential court records.

November 9, 1987

/s/ Charles A. Trost
Attorney for Plaintiff

/s/ H. Rowan Leathers, III
Attorney for Defendant

IN THE CHANCERY COURT
OF DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

86-933-I
86-934-II

[Filed Sep. 9, 1988]

SOUTHERN LIVING, INC.,
PROGRESSIVE FARMER, INC.,
-vs- *Plaintiffs,*

KATHRYN BEHM CELAURO,
Commissioner of Revenue,
State of Tennessee,
Defendants.

TRIAL PROCEEDINGS

November 13, 1987

Before

Chancellor Irvin H. Kilcrease, Jr.

APPEARANCES:

Mr. Charles Trost
Attorney at Law
2100 One Commerce Place
Nashville, Tennessee 37219

Mr. Lee Borden
General Counsel
Southern Progressive

For Plaintiffs

Mr. H. Rowan Leathers
Deputy State Attorney General
450 James Robertson Pkwy
Nashville, Tennessee 37219

For Defendants

* * * *

[23] A: In Rule 46, number 2, it states, "In order to constitute a newspaper the publication must contain at least the following elements.

"A: It must be published at stated short intervals, usually daily or weekly.

"B: It must not, when its successive issues are put together, constitute a book.

"C: It must be intended for circulation among the general public.

"D: It must contain matters of general interest and reports of current events."

Q: Are these the exclusive criteria approved by the Department of Revenue to determine whether a periodical publication qualifies as a newspaper?

A: These are not the only ones. As the rule states, these are the—it must contain at least these four areas.

Q: What other things might the Department of Revenue consider in determining whether or not a periodical publication qualifies as a newspaper?

A: We try to look at what is the common and ordinary meaning of "a newspaper" or "magazine."

Q: Exactly what do you mean by, "the [24] ordinary meaning of a newspaper or magazine"?

A: Well, for example, does a newspaper contain local advertising? Does it contain comics? Does it contain an obituary section? Does it contain classified ads, advertising, those kinds of things that would normally be classified as "a newspaper" under the common and ordinary meaning of "a newspaper." In other words, a newspaper contains news, instead of just being for entertainment or enjoyment.

Q: So in determining what is the plain and ordinary meaning of the word "newspaper," you can't simply set a hard and fast definition down. It more or less depends on the individual instance; is that correct?

A: That's correct. Each set of circumstances have to be looked at to make those determinations.

Q: Mr. Bracey, why does the Department of Revenue consider the plain ordinary meaning of the word "newspaper" in determining whether or not periodical publications qualify for the newspaper exemption?

A: Because the law specifically exempts newspapers under 67-6-329 and simply states in number [25] 3, "newspapers."

MR. LEATHERS: Your Honor, I would again like to seek Mr. Ehler's assistance in determining what the exhibit numbers are for various exhibits introduced here. First the copy of the Southern Living publication.

CLERK: Marked exhibit G.

MR. LEATHERS: Copy of Creative Ideas For Living publication, the Progressive publication; also included is the copy of the Newsweek publication. I will ask collective exhibit G be handed to Mr. Bracey.

(Above referenced document marked for identification as Exhibit G.)

Q: Mr. Bracey, I would first ask that you put before you the Southern Living publication which is contained within exhibit G. I'd like to ask you just a few questions about that publication.

(Respite). Do you have it in front of you?

A: Yes.

Q: First, we can presume that since we are here in court disputing this issue that the Department has not determined that publication to be a newspaper; is that correct?

A: That's correct, we do not consider it [26] a newspaper.

Q: Why doesn't the Department of Revenue consider such publication qualified as a newspaper?

A: It would certainly not fall under the common and ordinary meaning of "a newspaper."

Q: Is there any other reason why the Department of Revenue might not consider the Southern Living publication to qualify for the newspaper exemption?

A: It is also directed at the Southern states. It's not widely distributed within the United States. It is addressing a segment of the population that is in the Southern states. I might indicate, too, whether it contains matters of general interest and reports of current events. I would say it does not.

MR. TROST: If your Honor please, can I speak to Mr. Leathers?

* * * *

[58] Q: We said it falls within the common and ordinary definition in all respects except one, it has no comics. Are you telling the Court if it has—

A: I will say I will make that determination after reviewing what was in the publication.

Q: You can't tell us right now that you would or would not exempt a publication, otherwise that is a newspaper, simply because they decided to stop running comics?

A: I would look at each case on its own merits and try to make the decision based on what I saw.

Q: And it is your testimony now that in addition to the four criteria set forth in the regulation, there is criteria that you have, such that it must contain local advertising, obituaries, it must contain comics and must contain classified ads, otherwise it does not meet all four of those additional criteria, heretofore unstated anywhere except in your testimony in court, they would not be [59] a newspaper; is that your testimony?

A: It must contain news, instead of just information that is more entertaining and just for entertainment.

Q: Well, what's comics for? Does that bring the news of the world? Do you read Doonesbury to get the news? Some people do.

A: Yes.

Q: Do you?

A: I don't read the local papers.

Q: Are the comics in there for the purpose of news?

A: It could be construed to be.

Q: Do you construe it as news?

A: I don't read the local papers.

Q: Do you construe it as entertainment?

A: It could be, yes, sir.

Q: And you're saying it's necessary that in addition to the news it must also entertain?

A: I'm saying it is part of the criteria.

Q: And absent having entertainment through the form of comics, would it be your opinion that this particular publication could not, in any form, shape or fashion, be classified as a newspaper? Is that your testimony?

[60] A: I think you have to look at—

Q: I'm asking you. I don't have to look at anything. I'm asking you to look at that question and answer the question. If it met all the criteria that you could think of between now and next Thursday, and the only thing lacking was comic strips, would that keep it from being a newspaper?

A: I would say probably not.

Q: All right.

A: But, again, let me say that I would look at each case on its own merits—

Q: Probably?

A: —based on the common and ordinary definition of a newspaper.

Q: In other words, you cannot tell us today that the Nashville Tennessean, which you have said meets all criteria of a newspaper, if they made an editorial decision they will stop paying cartoonists and comic strip writers and put no more comic strips in the newspaper, that they will not thereafter enjoy the exemption? Or is it such a complicated and difficult question you have got to take it and ponder it for awhile?

A: I think we have to look at each situation, based on its own merits. You are asking [61] me hypothetical questions, which I don't have a copy of The Tennessean in front of me.

Q: Have you ever read The Tennessean?

A: Yes. I don't read it on a regular basis.

Q: Do you know it has comics in it?

A: It had when I read it.

Q: And you have said it is classified as a newspaper?

A: Yes, sir.

Q: Now I'm asking you a very simple question. If Gannett, who owns it, made a determination they're going to continue to publish it in all respects like they've been doing for a hundred years, and the only thing that changed is that they're going to quit running comics in it, does that make it, in your opinion, ceases being an exempt newspaper?

A: Again, that is a hypothetical question.

Q: And you can answer it hypothetically.

A: I'm saying you have to look at the common and ordinary definition of "a newspaper."

Q: Are you saying you will not or cannot answer the question?

[62] A: I guess I'm saying what I would like to do is take each case on its own merits and look at the contents of the paper.

Q: And I believe I'm asking you to take that case and view it on its merits right now. Can you answer the question? Would that one simple fact keep it from being a newspaper, the absence of comics?

A: Based on my experience with The Tennessean, I would say it would still probably be classified as a newspaper.

Q: Can I take that as a yes?

A: Yes.

Q: Then is it an accurate statement to say it does not require that all four criteria make it a newspaper?

A: Those are indications that help define what is a common and ordinary definition of "a newspaper."

Q: And we've just determined that at least one of them could be missing and its still be a newspaper; is that correct?

A: You said comics.

* * * *

[86]

CERTIFICATE

STATE OF TENNESSEE

COUNTY OF WILLIAMSON

I, Ray L. Walker, Court Reporter and Notary Public in and for the County of Williamson and the State of Tennessee at Large, do hereby certify that I recorded the foregoing proceedings in machine shorthand: that the witness was first duly sworn, that the proceedings were reduced to typewriting by me, and that the foregoing is a complete and accurate transcript of the said proceedings, to the best of my ability.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties hereto, nor a relative or employee of such attorney or counsel, nor do I have any interest in the outcome or events of these proceedings.

IN WITNESS WHEREOF, I have hereunto affixed my signature and official seal of office, this 6th day of August 1988, at Brentwood, Williamson County, Tennessee.

/s/ Ray L. Walker
RAY L. WALKER
Notary Public at Large
State of Tennessee

My Commission Expires 3/17/91

[87] The Plaintiff tenders this Transcript of the Proceedings, as ordered an permitted by the Court. The same having been duly approved by counsel and by this Court, the same is signed an ordered to be filed by the Court as part of the record in this cause as such Transcript of Proceedings.

/s/ Irvin H. Kilcrease, Jr.
CHANCELLOR IRVIN H. KILCREASE, JR.

/s/ Charles Trost
CHARLES TROST
Attorney at Law
Attorney for Plaintiff

/s/ Daryl J. Brand
DARYL J. BRAND
State Attorney General
Attorney for Defendant

Filed in the office of the Chancery Court Clerk of Davidson County, Tennessee, at Nashville, this the —— day of ——, 1988.

Chancery Court Clerk

[88]

FILING ATTORNEY'S CERTIFICATE
OF FILING AND NOTICE

The undersigned hereby certifies that he has lodged the foregoing transcript of this Proceeding with the clerk of the trial court within the time allowed by law and has sent an exact copy of this certificate and notice of such filing to all other interested parties and/or their attorneys, all pursuant to the Tennessee Code Annotated.

This 8th day of August 1988.

/s/ Charles A. Trost
CHARLES A. TROST
Attorney for Plaintiff

CHANCELLOR'S CERTIFICATE OF APPROVAL
OF THE TRANSCRIPT OF PROCEEDINGS

On the trial of this case, the foregoing was all the evidence submitted to the Court, and no written objections as to the accuracy or authenticity of the Transcript of Proceedings having been filed within ten days of the lodging of the said Transcript of Proceedings with the clerk of the trial court, I hereby certify approval of said Transcript of Proceedings and authentication of the attached exhibits, pursuant to the Tennessee Code Annotated.

WITNESS my signature this — day of —
1988.

CHANCELLOR IRVIN H. KILCREASE, JR.